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Supreme Court, U.S.
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No. 03-1259

IN THE
Supreme Court of the United States

JOHN DAVID ROGERS,

Petitioner,

v.

NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, on the unique facts of this case, a railroad may be held liable for an injury to one of its employees caused by the rupture of a slurry pipe at a sand company plant when no evidence was presented that the railroad had actual or constructive notice that there were pipes underneath the railroad track, that those pipes carried slurry under pressure, or that the sand company had violated standard engineering practices by failing to encase the underground portion of the pipe.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Norfolk Southern Railway Company states that its parent corporation is petitioner Norfolk Southern Corporation. No other publicly held corporation owns more than 10% of Norfolk Southern Corporation's stock.

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BRIEF IN OPPOSITION

The decision below is not remotely worthy of review by this Court. The broad question set forth in the petition – whether a railroad has a duty under the Federal Employers' Liability Act (FELA) "to inspect third-party premises on which the railroad's workers are required to perform their duties," Pet. i, 7 – is not presented by this case, and petitioner's claim of a conflict of authority is contrived. To the contrary, the South Carolina Supreme Court expressly recognized the railroad's duty to exercise reasonable care in ensuring the safety of third-party premises for its workers, but (adopting the analysis of the court of appeals) held that there was no breach of any duty by the railroad. Pet. App. 7a-8a; Pet. App. 19a-22a (acknowledging railroad's duty to conduct reasonable inspections of third-party premises but finding no liability on the facts of this case). There is no reason for this Court to delve into the factbound question of what Norfolk Southern knew or should have known about certain slurry pipes at a particular South Carolina sand plant in 1993, when petitioner's arguments about the sufficiency of the evidence have been rejected by two levels of appellate courts; petitioner does not contest the standard of review applied; and resolution of that issue has no conceivable importance beyond this case. Not a single other reported FELA case involves injuries of railway workers from unencased pipes under railroad tracks (much less slurry pipes at sand plants). Furthermore, this case is not a proper vehicle even for resolution of that rare and factbound question, since there was no evidence in the record that Norfolk Southern even had constructive notice of the slurry pipes, and petitioner now espouses a theory of negligence he never argued to the jury.

STATEMENT OF THE CASE

A. Evidence at Trial

1. The accident in this case occurred on the grounds of a silica sand plant owned and operated by the U.S. Silica Company in Edmund, South Carolina. The Edmund plant produces two principal products: whole grain sand (referred to as "sand") and finely ground sand (referred to as "flour").

Norfolk Southern provides rail service to U.S. Silica's plant, operating its engine and cars over a spur track that runs from the railroad's main line to the U.S. Silica plant. U.S. Silica's predecessor built the spur track in 1961, and U.S. Silica owns and maintains it today. Norfolk Southern performs no maintenance on the spur track.

The spur track splits into two parallel tracks at the end, alongside the plant. The two parallel portions of the spur track are referred to as the "sand" and "flour" tracks. To serve the plant, Norfolk Southern leaves its cars on the sand and flour tracks for loading by U.S. Silica employees. Norfolk Southern trains come to the plant three days a week to leave empty cars and haul off full cars for shipment to U.S. Silica customers, such as glass and fiberglass companies.

2. On June 28, 1993, a Norfolk Southern train arrived at the plant. While waiting for U.S. Silica employees to finish loading cars on the flour track, the crew, consisting of a conductor and an engineer, left the train and took a break. When they returned, they discovered that a big hole of unknown origin had appeared beneath the flour track directly in front of the train. Several of the cross-ties were dangling from the rails over the hole. The Norfolk Southern conductor went inside and notified two U.S. Silica employees, who returned to the hole with him and examined it. The U.S. Silica employees made no comment or explanation to the crew about the hole, its cause, or any prior problems.

Norfolk Southern requires that a track supervisor examine any problem to determine whether a train can operate safely over a track. If not, the track supervisor orders the track out of service. The conductor called the railroad dispatcher to report the hole, and the dispatcher in turn relayed the message to the head track supervisor. The supervisor assigned petitioner Rogers, an assistant track supervisor, to inspect the track and the hole underneath it.

Rogers was a 19-year veteran of the railroad. Like all railroad track supervisors, Rogers's principal duty was to inspect tracks. After arriving at the U.S. Silica plant, Rogers began approaching the hole along the track. He stepped within one to two feet of the sandy edge of the hole to examine it. Suddenly, he sensed the ground beneath his feet giving way, and he jerked back away from the hole. At that moment, he felt pain in his back and so commented. Rogers reinjured his lower back, which had been injured in on-the-job incidents in 1985 and 1989 for which he had been compensated.

The cause of the hole was later determined to be the rupture of a pipe that carried slurry (a mixture of sand and water) underground beneath the spur tracks. The pipe that ruptured was called the "8 and 9 line," so named because it was associated with pumps 8 and 9, which are located alongside a factory building behind the spur tracks. This line was a 4-inch diameter Nypak (plastic) pipe. It ran 5 feet below the surface and underneath the tracks. It carried slurry out of the plant when there was an excess of sand in the plant. Unlike another pipe under the tracks that brought slurry into the plant, it was not encased because it was used less frequently and was expected to last longer.

There was testimony at trial that the pumping of slurry through pipes at pressure has a sandblasting effect on pipes. Once a pipe springs a leak, other leaks are certain, and the entire pipe has to be replaced. When leaks appeared, U.S. Silica employees would dig down to the pipe, put a band

around that spot in the pipe as a temporary patch, refill the hole, and later dig out and replace the entire pipe. When only slurry is pumped through a pipe, a rupture will cause sand and water to bubble up to the surface; no hole will appear in the sandy ground above the pipe, because the sand from the slurry is being discharged. But if water alone is pumped through the pipe, it will wash out the sand above the pipe, and the ground may cave in.

The underground pipe used on the "8 and 9 line" fractures approximately every 18 months to 2 years and requires replacement. Add. 5a (R. 214). The "8 and 9 line" pipe had blown out several times before – including June 26, 1993, two days before the accident in this case. *Id.* at 3a-5a (R. 172-173, 214). U.S. Silica employees had seen water and sand bubbling up, and so they placed a temporary band over the hole at that time and covered up the hole. Yet no U.S. Silica employee informed anyone at Norfolk Southern of the prior rupture of the 8 and 9 line pipe. *Id.* at 1a-2a, 3a, 4a, 15a-16a (R. 58, 62, 162, 178, 182, 794-795, 800-801, 803).

The uncontroverted evidence at trial was that Norfolk Southern never had any knowledge that there were pipes underneath the track, much less that those pipes carried slurry. Certainly Norfolk Southern had no notice the pipes were not encased underground in accordance with standard engineering practice. Add. 2a, 6a, 7a (R. 62, 271-272, 554). Indeed, Rogers was the railroad employee most familiar with the U.S. Silica plant. He had visited the plant 12 to 15 times, roughly once per month, to routinely inspect U.S. Silica's spur track during the year and a half he had been assigned to this territory. Rogers himself testified that he never knew of any pipes beneath the flour or sand tracks. *Id.* at 9a (R. 669).

It has long been Norfolk Southern's practice to negotiate a sidetrack agreement with an industry that it services with rail cars. The sidetrack agreement covers numerous issues, such as facilities the industry may operate near the track, the terms and conditions of operation, title, allocation of maintenance

and regulatory responsibilities and cost, clearances, indemnity, liability rules, car loading practices, signage, delivery, and rules for discontinuation of service. The track maintenance provisions require the industry to comply with the railroad's conditions. R. 1244.

Norfolk Southern follows the comprehensive standards set by the American Railroad Engineering Association (AREA). As relevant here, Part 5 of the 4-volume AREA manual includes a 19-page chapter setting forth engineering practices for pipelines near railroad rights-of-way. R. 1118-1136, R. 325. One provision in Part 5 deals with standards applicable to pipelines conveying nonflammmable substances, and provides that if a pipeline carries substances that "might cause damage if escaping on or in the vicinity of railway property," then any "[p]ipelines under railway tracks and across railway rights-of-way shall be encased in a larger pipe or conduit called the casing pipe," unless exclusions apply (such as approval by the railroad's engineer). R. 1132 (AREA §§ 5.3.1 & 5.3.2). Even apart from the AREA standards, standard engineering practices require casing around such pipes. R. 398.

Although there was no direct evidence whether the railroad had or had not sent the AREA standards to U.S. Silica, Norfolk Southern's Division Engineer testified that based on usual practice he assumed Norfolk Southern did so when the sidetrack (spur track) was first built by U.S. Silica back in 1961. Add. 8a-9a (R. 556, 643). Record evidence indicated that U.S. Silica's "failure to execute the sidetrack agreement was unrelated to the unencased pipes below the spur track." Pet. App. 20a n.8.

Even absent the sidetrack agreement, the U.S. Silica plant manager acknowledged that the company had a duty to notify Norfolk Southern if it ever wanted to install pipes beneath the tracks, and that he knew of the railroad and industry standards requiring that pipes under rail tracks should be encased. Add. 14a-15a (R. 762-764). Yet Norfolk Southern never received a

request, application, or notification concerning the presence or installation of pipes from this plant under the track, or any notification of any ruptures. *Id.* at 6a-8a (R. 548-549, 555).

Rogers argued to the jury that the negligence of both U.S. Silica and Norfolk Southern caused the unsafe condition that injured him. Rogers's theory of Norfolk Southern's negligence was that it failed to enter into a sidetrack agreement with U.S. Silica that would have incorporated its AREA standards. The jury found both defendants liable and awarded Rogers $3 million in damages for aggravation of a preexisting back injury, apportioning 70% of the fault to U.S. Silica and 30% to Norfolk Southern. Pet. App. 3a. The trial court upheld the verdict, and ruled that each defendant was jointly and severally liable to Rogers for the entirety of the judgment, and that the apportionment would be relevant only to any later action in contribution. Pet. App. 46a-47a.

B. Misstatements of Fact In the Petition

Respondents are obliged to "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Sup. Ct. R. 15.2. The petition is replete with erroneous characterizations of the record, in large part because petitioner Rogers is attempting to muster evidence to support a constructive notice/duty-to-inspect theory of negligence that he never tried to the jury. As noted above, the *only* claim of negligence that Rogers presented to the jury – as can be seen from his counsel's closing statement to the jury, which is reproduced in its entirety in the addendum to this brief – was that Norfolk Southern was negligent in not refusing service until U.S. Silica signed a sidetrack agreement incorporating the AREA standards, and therefore the presence of the unencased slurry pipe on U.S. Silica's property was a breach of Norfolk Southern's duty to provide Rogers a safe workplace. Add. 16a-38a (R. 953-967, 985-996). That was also the theory and evidence on which Norfolk Southern's motion for directed verdict had been denied. Pet. App. 69a

(R. 908). That tenuous theory was rejected by the appellate courts below on multiple grounds, Pet. App. 20a-22a, and Rogers understandably does not seek review on that issue or even mention that theory in his petition.

Rogers's current theory that Norfolk Southern had constructive knowledge of the presence of slurry pipes under the property, and was negligent in failing to inspect those pipes to determine if they were encased, did not appear in the case until *after trial* when the trial court ruled on Norfolk Southern's posttrial motion for judgment notwithstanding the verdict. The trial court, apparently realizing that Rogers's sidetrack-agreement theory of negligence would not support the verdict, denied Norfolk Southern's motion on the grounds that "Norfolk Southern at least had constructive notice of the slurry pipes underneath the spur tracks at the U.S. Silica plant." Pet. App. 27a-28a. The trial court surmised that Norfolk Southern "was surely aware of the nature of U.S. Silica's slurry operations at the West Columbia plant, because Norfolk Southern track supervisors had been called to that facility on prior occasions to inspect the tracks," and "[t]hese facts alone" supported a finding of constructive knowledge. *Id.* at 28a. The trial court never explained what evidence supported an imputation of knowledge of slurry operations to Norfolk Southern track inspectors, when the railroad simply delivered and picked up cars that U.S. Silica loaded with *dry* sand products for transportation to customers. There was not a shred of testimony that railroad employees knew or should have known what slurry was; knew or should have known that U.S. Silica operations involved slurry; knew or should have known that slurry can cause pipe ruptures; knew or should have known that the pieces of equipment near the track were slurry pumps; knew or should have known that there were pipes running from those pumps underneath the railroad tracks; or knew or should have known that those pipes were not encased. Rogers simply never tried a constructive notice or duty-to-inspect case to the jury, and

indeed never requested an instruction defining constructive notice. Cf. *id.* ("constructive notice" is "'knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the *duty of inquiring into it.*'").

Both in the state appellate courts and in this Court, Rogers has attempted (unsuccessfully) to cobble from the record evidence that might support the inspection theory he never tried to the jury. In doing so, petitioner misstates record evidence or takes it wholly out of context. The petition's description of Norfolk Southern's putative negligence begins with the statement that "[d]espite the frequency with which Norfolk Southern employees were at the U.S. Silica facility, Norfolk Southern never inspected that premises (or otherwise inquired) to determine whether the slurry pipes that ran under the track were cased in the manner required by industry standards." Pet. 4. The petition supports this contention only by citing to excerpts of the testimony of the Norfolk Southern track supervisor (Smith) that he never required U.S. Silica to encase pipes running underneath the track, or instructed anyone to inquire whether those pipes were encased. Pet. App. 67a-68a (R. 802-803). But the petition conveniently omits Smith's prior testimony explaining why: namely, that he never knew that there were any slurry pipes running underneath the track! Add. 16a (R. 795) ("Q: Did you know that there were high pressure slurry pipes running underneath that track? A: No."). A track supervisor will not issue instructions to encase pipes underneath tracks if he does not know of their existence. Nor, as noted above, was any testimony adduced to prove that Smith or any other railroad employee should have known of those pipes or inspected for them.

Next, the petition states that "Norfolk Southern failed to take these actions even though the record, including photographic evidence, showed that the slurry pipes were

visible – indeed, they ran above-ground for a full quarter of a mile after coming out of the ground on the side of the track – and even though the nature of the plant strongly indicated that slurry would need to be conveyed across the rail line." Pet. 4. At the outset, it is important to note the testimony that Rogers invokes in support of this claim did not purport to address what would have been visible to Norfolk Southern employees from the spur track; petitioner is simply taking snippets from the testimony of U.S. Silica employees (and accompanying exhibits) about the location of the slurry pipe that ruptured, and trying to retrofit the testimony to his new theory.

In any event, that single statement in the petition mischaracterizes the record in multiple respects. First, in the excerpted testimony, James Gentry, an employee of U.S. Silica who worked as a mill helper maintaining slurry pumps, did not address the visibility of the 8 and 9 line pipe as it entered the ground from the pumps adjacent to the building near the spur track. He testified only that he had seen the pipe "as it comes *out of* the ground, then I can see it" because there "it's exposed." Pet. App. 54a (R. 90) (emphasis added). Indeed, Gentry could not identify exactly where under the track the underground portion of the pipe ran. *Id.* (R. 89) ("It runs out that way, but where I don't know.").

Second, the petition states that the 8 and 9 line slurry pipe "ran above-ground for a full quarter of a mile after *coming out of the ground on the side of the track*." Pet. 4 (emphasis added). The statement is factually incorrect. The slurry pipe does not come out of the ground on the side of the track, and there is no testimony or photographic evidence to that effect. In fact, all the evidence is to the contrary. The only evidence the petition cites is the later testimony of Gentry while looking at an *aerial* photograph of the plant (Exh. 1, R. 1097). Gentry testifies that the 8 and 9 line runs out to a big sand pile south of the plant, and that in the "lower left hand portion of Exhibit No. 1" one can see the pipe emerge and run roughly a quarter mile to the sand pile. Pet. App. 55a (R. 115). But the

tracks are in the lower right-hand portion of the aerial photograph (in horizontal view), and (although Gentry does not testify as to the distance from the tracks, and the photograph is not scaled) the thin line on the photograph would appear to emerge somewhere in the range of 125 to 150 feet from the tracks. See also Add. 5a (R. 217) (140 feet of pipe used to replace the underground pipe after the accident). The pipe does not emerge at the side of the tracks.

Even more critically, there was no testimony that the exposed portion of the pipe some 125 to 150 feet away would have been visible to any Norfolk Southern employee working on or inspecting the spur track. The various photographs in evidence (including Exhibit 1) indicate both a wall of high shrubbery and large sand piles obscuring any view of the land west of the tracks where the exposed pipe emerged. R. 1097-1106. But these facts were never adduced at trial because Rogers never tried a constructive notice or duty-to-inspect case to the jury, or sought to tie Norfolk Southern's putative negligence to the visibility of pipe. His current appellate theory of negligence seems to rest upon the implausible premise that Norfolk Southern has a duty to conduct aerial surveillance of customer sites for any indications of possible hazards, but this was not a theory that was submitted to the jury.

Third, there is no testimony whatsoever that supports the petition's claim that "the nature of the plant strongly indicated that slurry would need to be conveyed across the rail line," and the petition cites none. Pet. 4. There is no testimony that operationally the plant had to discharge slurry to the west (underneath the tracks), as opposed to north, south, or east. More to the point, there was no testimony to establish that anyone at the railroad was or should have been aware of the slurry operations, or that the railroad could be charged with knowledge of the claimed necessity that U.S. Silica had to run pipes under the tracks in order to discharge excess slurry from the plant. Rogers himself said that he did not know anything

about the plant except that it produced sand. Add. 13a (R. 708-709). Once again, the railroad's notice of slurry operations and discharges at U.S. Silica's plant was not an issue at trial.

Indeed, there is rich irony in Rogers's current claim that the pipes were plainly visible to Norfolk Southern inspectors when he was the Norfolk Southern inspector with principal responsibility for the U.S. Silica spur track. At trial, Rogers testified that he never noticed the pipes on his many inspections of the U.S. Silica track. Add. 11a-12a (R. 707-708). If (contrary to fact) Rogers's theory at trial had been that Norfolk Southern was negligent for failing to see pipes in plain view that should have prompted further inspection or inquiry, he could not have prevailed; an injured employee cannot seek to hold a railroad liable for his own negligence. *Atlantic Coast Line R.R.* v. *Driggers*, 279 U.S. 787, 792 (1929).

Finally, Rogers asserts that "a Norfolk Southern engineer testified that Norfolk Southern reviewed the plans and specifications of all sidetracks, including the one at U.S. Silica's facility, and that those plans would have shown the piping under the tracks." Pet. 4; *id.* at 9. That is untrue; the engineer (Cody) did not testify Norfolk Southern would have reviewed plans or specifications showing the 8 and 9 line slurry pipe. In the testimony cited in the petition, Cody testified that before a private company could build a track that would be used by Norfolk Southern, "[t]heir plans would have had to be approved by our engineering and design department *before they could build the track*." Pet. App. 63a (R. 570) (emphasis added). Cody testified that he had no record of the U.S. Silica plans and specifications. *Id.* Rogers's counsel then asked hypothetically, "But those plans and specifications would then tell you whether the *piping that is underneath the track when it's built* are encased or not?," to which Cody replied, "Yes, sir.'" *Id.* at 64a (emphasis added).

Cody thus testified (based on his experience) that when the U.S. Silica spur track was built, Norfolk Southern would have reviewed plans and specifications in advance that should have shown whether any piping underneath the track *at that time* was encased. The U.S. Silica spur track was built in 1961, Add. 8a (R. 556); R. 1229; the year in which the 8 and 9 line was first laid was unknown. Add. 2a-3a, 5a (R. 156, 214). The only plan of the U.S. Silica site that was in the record was a detailed plat drawn in 1980, and that plan does not show the 8 and 9 line pipe. R. 1245. Thus, the only inference that might be drawn from the record is that the 8 and 9 line pipe had *not been built* by 1980, and therefore Norfolk Southern did *not* have notice of such a pipe when it reviewed the spur track plans in 1961. In short, the evidence does not support Rogers's current theory, and he never tried a duty-to-inspect or constructive notice case to the jury.[1]

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[1] Rogers's counsel did raise one inspection-related theory of negligence in closing that was outside the record, and that Rogers has not advanced in the petition. Counsel stated in his summation that "[t]he railroad had another department that came out there and was supposed to look to see if the pipes were under the track and if the pipes were cased and if the pipes were proper there, but they didn't do that." Add. 32a (R. 989). There was no testimony to that effect. His counsel had asked Rogers during direct examination whether any other Norfolk Southern department had the responsibility for "going out to U. S. Silica and inspecting the pipes that might run under the track." Add. 9a (R. 669). Rogers could not testify truthfully that the Bridge and Building Department had any responsibility for inspecting customer factory pipes, so he gave the nonresponsive answer that "[t]he Bridge and Building Department has the ultimate responsibility of checking or inspecting and checking culverts, water lines, that type stuff." *Id.* Rogers later admitted on cross examination that that department only inspected bridges and buildings that were "railroad property" and "big culverts[] that go under the main line of the railroad," and that he had never seen any such facilities at U.S. Silica. *Id.* at 10a-11a (R. 699-700). Norfolk Southern objected to this argument at closing as outside the record, and the trial court admonished Rogers's counsel to confine his argument to the record. Add. 32a (R. 989).

C. Appeals In State Court

After the trial court entered judgment in favor of Rogers, both Norfolk Southern and U.S. Silica appealed. Rogers settled with U.S. Silica while the case was pending before the court of appeals. In Norfolk Southern's appeal, Rogers attempted to press his post-hoc theory of constructive notice in defending the judgment, but both the court of appeals and the state supreme court rejected it.

1. The court of appeals held that "'under the FELA, 'plaintiffs are still required to prove traditional common law elements of negligence: duty, breach, foreseeability, and causation,'" but even slight evidence of negligence would suffice. Pet. App. 15a (alteration omitted) (quoting *Brown v. CSX Transp., Inc.*, 18 F.3d 245, 249 (4th Cir. 1994)). The court further held that Norfolk Southern had a duty to exercise reasonable care to provide a safe workplace to its employees, and that "'[t]his duty exists even when the employees are on the premises of a third party over which the employer has no control.'" *Id.* at 16a. A railroad is not under an absolute duty to remove all workplace dangers, and the key issue in negligence is reasonable foreseeability of the harm. *Id.* "'Events too remote to require reasonable prevision need not be anticipated.'" *Id.* at 19a (quoting *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 483 (1943)). The court further stated that

> "[t]he employer must conduct proper inspections to discover dangers in places where employees are required to work, and must take reasonable precautions for the employees' safety after determining the existence of such dangers. But even under the FELA, an employee still must establish that the employer was guilty of some act of negligence in order to recover."

Id. (quoting *Norfolk S. Ry.* v. *Trimiew*, 480 S.E.2d 104, 106 (Va. 1997)).

Applying this law, the court of appeals found no negligence as a matter of law. It rejected the trial court's conclusion that the railroad "had constructive notice of the slurry pipes underneath the spur tracks at the U.S. Silica plant" as unsupported by the evidence:

> there is no indication from the record that Norfolk had any reason to know that U.S. Silica had slurry pipes running under its spur tracks, much less that these pipes were not encased as required by the AREA standards and by general engineering standards. Even when the conductor found the hole on the afternoon in question, none of U.S. Silica's personnel made any mention of the slurry pipes below the tracks or that such a pipe under the track had burst two days before this incident. Norfolk cannot be expected to know the operational details of a sand plant or of the placement of pipes it did not know even existed.

Id. at 18a-19a. Accordingly, Rogers had failed to establish the foreseeability element of his negligence cause of action:

> We hold it was not reasonably foreseeable that Rogers would be injured by inspecting the track or a hole under the tracks at this location. Unless a Norfolk employee saw or knew of the prior pipe leaks, or at least knew that pipes were in the ground beneath the tracks, it is impossible for Norfolk to have had actual or constructive knowledge of any danger at this location.

Id. at 19a. Given Norfolk Southern's lack of knowledge regarding the existence of the unsafe condition, it "also could not have provided Rogers with any warnings that would have prevented his injury."[2]

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[2] Having dispensed with the trial court's reasoning, the court of appeals also rejected on multiple grounds the (now abandoned) theory that Rogers pressed at trial that Norfolk Southern was negligent in providing service to U.S. Silica before the latter had signed the sidetrack agreement. Pet. App. 20a-22a. The court of appeals also did not have occasion to address the

2. The South Carolina Supreme Court affirmed. Like the court of appeals, the state supreme court held that "Norfolk Southern has a non-delegable duty to provide Rogers a safe place to work, even when Rogers is working on the property of a third party." Pet. App. 5a. But that duty only extends to foreseeable dangers. *Id.* "'The employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end, the degree of care being commensurate with the danger reasonably to be anticipated.'" *Id.* at 7a (alteration omitted) (citing *Isgett* v. *Seaboard Coast Line R.R.*, 332 F. Supp. 1127, 1139 (D.S.C. 1971)). Reviewing the record, the supreme court concluded that "[w]e fail to see how, in this instance, Norfolk Southern could have been any more prudent." *Id.* It sent Rogers out as "the first responder" to inspect the danger when it was informed of the hole. As to the claims of prior constructive knowledge, the supreme court held that "[w]e agree with the Court of Appeals that Norfolk Southern was not chargeable, prior to Rogers' arrival, with knowledge of the cause of the problem at the site," citing to the page of the court of appeals opinion where the lower court held that Norfolk Southern "had no knowledge, actual or constructive, that the underground slurry pipe which caused the hole was installed beneath U.S. Silica's spur track." *Id.* (citing *Rogers* v. *Norfolk S. Corp.*, 538 S.E.2d 664, 669 (S.C. Ct. App. 2000) (Pet. App.17a)). "The law does not require that employers be omniscient, only that they exercise reasonable care." *Id.* Although it took issue with the lower court's description of the standard of review,[3]

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clear excessiveness of the $3 million verdict (most of which were noneconomic damages) for the aggravation of a prior back condition where the plaintiff had two prior back injuries and surgeries and degenerative disc disease since at least 1985, and had been golfing "a dozen times" *after* the U.S. Silica accident. Add. 9a-10a (R. 696-697).

[3] The court of appeals had invoked both the state and federal standard for review of jury verdicts. Pet. App. 15a, 17a-18a. The state supreme court determined that there was a difference between the two standards,

the South Carolina Supreme Court held that "[t]he Court of Appeals arrived at the correct result as to all allegations of negligence." *Id.* at 7a-8a. Two justices dissented. *Id.* at 8a-10a.

REASONS FOR DENYING THE PETITION

There is not the slightest reason for this Court to review the decision below. The claim of a conflict with precedent of this Court and other lower courts is illusory; Rogers misconceives the law regarding an employer's duty to inspect the property of third persons; the question of whether Norfolk Southern had constructive notice of potentially dangerous pipes is factbound and of no conceivable relevance beyond this case; the negligence theory espoused in the petition was not the one tried to the jury; Rogers's claims of constructive notice are based on mischaracterizations of the record; and the other codefendant was held jointly and severally liable for the entirety of Rogers's damages. In sum, certiorari should be denied.

Rogers trumpets this case as involving "a split of authority ... on a significant and recurring issue under the FELA: whether railroads have a duty to inspect third-party premises where their employees work." Pet. 7. The problem for Rogers is that the South Carolina Supreme Court never held that the railroad has "no duty to inspect third-party premises to find and to correct potentially dangerous conditions before injuries occur." *Id.* at 17. Quite to the contrary, the court below expressly held that the railroad's duty to exercise reasonable care to provide a safe workplace extends to third-party premises. Pet. App. 5a. It relied on the Virginia Supreme Court's decision in *Trimiew*, *id.*, which characterized the duty to provide a safe workplace as

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and that the court of appeals should not have invoked the state standard, but held that the result would be the same under the federal standard for the reasons given. *Id.* at 3a-5a, 8a. Petitioner does not take issue with the standard of review applied by the South Carolina Supreme Court.

including the duty to conduct reasonable inspections. *Norfolk S. Ry.* v. *Trimiew*, 480 S.E.2d 104, 106 (1997). Indeed, the South Carolina Supreme Court below stated the substantive legal standard in language directly drawn from this Court's opinions.[4]

Furthermore, the South Carolina Supreme Court adopted the analysis of the court of appeals as to "all allegations of negligence," Pet. App. 8a, and the court of appeals (quoting *Trimiew*) expressly held that a railroad "'*must conduct proper inspections to discover dangers in places where employees are required to work*, and must take reasonable precautions for the employees' safety after determining the existence of such dangers.'" *Id.* at 19a (emphasis added). The state supreme court never questioned this statement of substantive law. Thus, contrary to petitioner's claims, the state supreme court did not reject the duty to inspect third-party premises. Instead, like the court of appeals, it simply found that Rogers failed to establish the factual predicate for his post-trial theory. *Id.* at 7a.[5] Rogers's attempt to claim a circuit conflict

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[4] *Compare* Pet. App. 5a ("Norfolk Southern has a non-delegable duty to provide Rogers a safe place to work, even when Rogers is working on the property of a third party"), *with Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. 1, 7 (1963) ("a railroad has the nondelegable duty to provide its employees with a safe place to work even when they are required to go onto the premises of a third party over which the railroad has no control"); *compare* Pet. App. 7a ("'[t]he employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end, the degree of care being commensurate with the danger reasonably to be anticipated.'") (alteration in original), *with Baltimore & Ohio S.W. R.R.* v. *Carroll*, 280 U.S. 491, 496 (1930) ("The employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools, and appliances, but only to the duty of exercising reasonable care to that end.")

[5] Rogers oddly characterizes the holdings of the state court of appeals and supreme court that Norfolk Southern was not chargeable with knowledge of the risks posed by the slurry pipe as a "rule of law," Pet. 15, when both courts clearly addressed only Rogers's failure of proof.

with every court that has recognized a duty to inspect third-party premises (see Pet. 12-15) is a mirage.

Indeed, it is Rogers (not the state supreme court) who is out of step with established law on inspection of third-party property. The duty of a railroad to ensure a safe workplace on third-party property existed at common law even prior to FELA. See, *e.g.*, *Baltimore & Potomac R.R.* v. *Mackey*, 157 U.S. 72, 89-91 (1895). Moreover, the common law rule (applicable to all employers, not just railroads) does not require the employer to inspect all third-party property that might conceivably pose hazards to its employees. Rather,

> [a]n employer has the duty to inspect and keep in repair premises or instrumentalities of another which are used by his employees *where he has control thereof, or the right to inspect and repair, or if he directs an employee to use them*; but this duty does not extend to premises over which he has no control and to which the employee goes on a temporary service.

30 C.J.S. *Employers' Liability* § 89, at 490 (1992) (emphasis added). The case on which Rogers principally relies, *Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. 1 (1963), is fully in accord with this definition. In *Shenker*, this Court held that where a railroad "required [the employee] to work with cars belonging to" another carrier, the railroad had a duty to inspect the foreign cars. See also *Nivens* v. *St. Louis S.W. Ry.*, 425 F.2d 114, 120 (5th Cir. 1970) (where railroad required its employees to use the tracks of another railroad, the railroad was under a duty to inspect the culvert supporting the tracks).

Here, the third-party property that Norfolk Southern required its employees to use was the U.S. Silica spur track (which Norfolk Southern neither owned nor maintained), and it is undisputed that Norfolk Southern performed continuous inspections of that property, and did so *before* any dangerous conditions appeared. Pet. App. 17a n.6, 19a n.7. It is also

undisputed that the presence of casing around an invisible underground pipe is a latent defect not discoverable by the ordinary and reasonable inspection of the spur track that inspectors like Rogers himself conducted. In his persistent refrain that Norfolk Southern "never inspected" the property for compliance with engineering standards, Pet. 1, 4, Rogers is instead postulating a much broader and unreasonable duty to inspect "the entire pertinent premises," *id.* at 16, that no other court has ever recognized. He would impose upon the railroad a duty (1) to inquire into customer manufacturing processes (here, the generation of slurry) to determine whether any substances were generated and discharged in a way that could cause a pipe to rupture; and (2) to inspect other parts of the plant *not used* by railroad employees for indications of structures (here, the plant pipe network) that might potentially pose latent risks to employees working on the spur track.

Such a novel duty to inspect "the entire pertinent premises," *id.*, would be unreasonable and unprecedented. As the court of appeals stated, "Norfolk cannot be expected to know the operational details of a sand plant or of the placement of pipes it did not know even existed." Pet. App. 18a-19a. Under petitioner's theory, a railroad would be under a continuous duty not just to inspect the customer's tracks, but to inspect the customer's plant (for example) for electrical wiring in buildings near the track that might conceivably pose a fire risk, or fuel or chemical tanks that might pose explosion risks, or smokestacks or other facilities emitting chemicals or fumes near the tracks that might pose long-term health risks to employees. Indeed, since it is always possible that invisible pipes could run underground from the foundation of any nearby building underneath the tracks, petitioner would presumably place the railroad under a continuous duty to inspect *every* third-party building in the vicinity of a customer spur track (or for that matter alongside any tracks in the railroad's entire system).

The law has never imposed such duties of inspection on an employer beyond property it directs its employees to use, and more to the point, there is no circuit conflict on that question. All of the cases relied upon by Rogers involve the duty to inspect third-party property that the railroad directed its employees to use or occupy. *Shenker*, 374 U.S. 1 (1963); *Nivens*, 425 F.2d 114 (5th Cir. 1970); *Lockard* v. *Missouri Pac. R.R.*, 894 F.2d 299 (8th Cir. 1990) (dangerous condition at a boarding house where the railroad directed its employees to stay); *Empey* v. *Grand Trunk W. R.R.*, 869 F.2d 293, 296 (6th Cir. 1989) (same); *Cazad* v. *Chesapeake & Ohio Ry.*, 622 F.2d 72 (4th Cir. 1980) (dangerous condition on property where railroad employee was repairing equipment); *Payne* v. *Baltimore & Ohio R.R.*, 309 F.2d 546, 549 (6th Cir. 1962) (operation of car on hazardous spur track of another).

Here, even though the unencased underground slurry pipe was not discoverable by reasonable inspection of the spur track itself, the state courts were open to proof that might otherwise establish the reasonable foreseeability of the condition that injured Rogers. See *Brown* v. *CSX Transp., Inc.*, 18 F.3d 245, 250 (4th Cir. 1994) (holding that absent showing that the railroad had prior notice of problem or that reasonable inspection would have uncovered the problem, plaintiff had failed to prove element of reasonable foreseeability). But Rogers adduced no facts probative even of Norfolk Southern's notice of slurry pipes underneath the track: "Unless a Norfolk employee saw or knew of the prior pipe leaks, or at least knew that pipes were in the ground beneath the tracks, it is impossible for Norfolk to have had actual or constructive knowledge of any danger at this location." Pet. App. 19a. Rogers disputes this factual conclusion, Pet. 4, 19, but as demonstrated above his contentions are unfaithful to the record. See *supra* at 7-12. In any event, there is no reason why this Court would wish to become embroiled in a factbound question about what Norfolk Southern knew or should have known in 1993 about

the existence of underground slurry pipes at one South Carolina sand plant. This is especially so since Norfolk Southern has not discovered any other reported FELA case involving railroad employees injured from ruptures of unencased pipes underneath tracks (slurry or otherwise). The accident here was a freakish event attributable to the unforeseeably gross negligence of U.S. Silica in not following standard engineering practice, and in not complying with its acknowledged obligations to inform Norfolk Southern of the pipes underneath the track.

Finally, quite apart from any question of conflicts on issues of law, Rogers claims a right to have this Court review the factbound question of the sufficiency of the evidence, even though he does not contest the more-than-a-scintilla legal standard of sufficiency that the South Carolina Supreme Court employed. Pet. 18-21. But this Court does not review the application of law to facts except in the most extraordinary circumstances. Sup. Ct. R. 10; *Kyles* v. *Whitley*, 514 U.S. 419, 456-57 (1995) (Scalia, J., dissenting) (capital case). This Court did undertake such review for a short period in the middle of the last century when the state courts routinely took FELA cases away from the jury by applying improper common law standards, but that period has long since passed. Even in that period, however, this Court commonly denied petitions seeking review of judgments taking a FELA case away from the jury or overturning a jury verdict, *Harris* v. *Pennsylvania R.R.*, 361 U.S. 15, 21-22 (1959) (per curiam) (Douglas, J., concurring) (noting 27 such cases between 1949 and 1958), and upheld many judgments for defendants as a matter of law.[6] Moreover, petitioner's

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[6] *See, e.g., Herdman* v. *Pennsylvania R.R.*, 352 U.S. 518 (1957); *Moore* v. *Chesapeake & Ohio Ry.*, 340 U.S. 573 (1951); *Reynolds* v. *Atlantic Coast Line R.R.*, 336 U.S. 207 (1949) (per curiam); *Northwestern Pac. R.R.* v. *Bobo*, 290 U.S. 499, 503 (1934); *St. Louis-S.F. Ry.* v. *Mills*, 271 U.S. 344, 347 (1926); *Lang* v. *New York Cent. R.R.*, 255 U.S. 455, 461 (1921).

claim that the South Carolina Supreme Court engaged in "extraordinarily … aggressive" review of a jury verdict, Pet. 9, is not only factbound, but is incorrect and rests on mischaracterizations of the record. *Supra* at 7-12.

Even if petitioner's theory were not so baseless in law and fact, Rogers faces the insuperable vehicle problem that he never presented his current theory of negligence to the jury. See *supra* at 6-7 & 12 n.1. The South Carolina Supreme Court can hardly be accused of invading the province of the jury, Pet. 19, by refusing to countenance a theory that Rogers never presented at trial, much less supported by evidence. There was no testimony (or argument) that established what the railroad should have known about slurry operations or about the practice (using water at pressure to clean the slurry out of the pipe) that actually washed away the sand under the track; whether railroad employees should have known the function of the equipment or pipes adjacent to the building; which pipes were visible to railroad employees in the course of their work; on what basis they should have concluded that the pipes ran under the tracks; what property should have been inspected; what would have constituted a reasonable inspection; and whether the latent defect of the unencased pipe was discoverable by such inspection. *Deans* v. *CSX Transp., Inc.*, 152 F.3d 326, 330 (4th Cir. 1998) ("while it is true that FELA imposes on the railroad carrier a duty to take reasonable precautions to inspect the workplace and protect its employees from possible danger, the plaintiff still carries the burden of proving some act of negligence by the carrier") (citation omitted). Rogers's duty-to-inspect theory is an afterthought to salvage an unsustainable verdict. "'Where the plaintiff tries his case on one theory in the District Court, without any indication of other possible theories, he will not ordinarily be heard to press other theories on appeal,'" and his verdict "cannot be sustained on a theory that was never

presented to the jury." *Sinclair* v. *Long Island R.R.*, 985 F.2d 74, 77-78 (2d Cir. 1993) (alteration omitted) (citing cases).[7]

CONCLUSION

For the foregoing reasons, the petition should be denied.

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[7] Finally, not only is this case unworthy of review, but also it does not involve an uncompensated plaintiff. Under the trial court judgment, both U.S. Silica and Norfolk Southern were 100% liable to Rogers under the judgment for the entirety of the $3 million in damages (with the jury's apportionment of 70% of fault to U.S. Silica and 30% to Norfolk Southern relevant to any future actions in contribution). Pet. App. 46a-47a. Rogers has received settlement from U.S. Silica, the only party that was negligent in this case.

ADDENDUM

ADDENDUM

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

Case No. 94-CP-20-49

JOHN DAVID ROGERS,

Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY
AND U.S. SILICA COMPANY,

Defendants.

TRANSCRIPT OF RECORD

(December 2-6, 1996)

Before: The Honorable Paul E. Short, Jr., Judge and a Jury

* * * *

[Testimony of Allen Corbitt Coleman, Tr. 118, R. 58]

Q. Did anybody tell you anything about why that hole – that there had been a hole there two days before?

A. No Sir.

* * * *

[Tr. 122, R. 62]

Q. Okay, here's the question. They didn't tell you at any time did they, these are U. S. Silica employees, that we had a blow-out on that same pipe on Saturday? Did they tell you that?

A. No, Sir.

Q. Did they tell you that there was a high pressure water pipe going underneath that track?

A. No, Sir.

Q. Did they tell you that there was a high pressure slurry line that wears out from time to time going under that track?

A. No, sir.

Q. Did you ever know until this case got started that there was any kind of high pressure line running under that track?

A. No. Sir.

* * * *

[Testimony of James Willard Holmes, Tr. 204, R. 137]

Q. Well, isn't there another way? You have got a culvert or casing pipe and you have got a Nypak pipe in the middle of it, okay? Slurry doesn't eat the pipe out regularly, does it?

A. Yes, it does.

Q. It eats it out all along the –

A. You will find in a slurry line that it typically eats it out at the bottom all of the time.

* * * *

[Tr. 223, R. 156]

Q. Okay, why was the eight inch line encased, the slurry line, but the four inch slurry line that also went under the track was not encased?

A. Because and I tried to answer this question earlier because the wear on the eight inch line is several times greater, you know, the life expectancy of that line is significantly less than it is with the eight and nine line and that other line had been there I don't know how long, you know, probably several years before the – that's the eight and

nine line – so the main reason the other one was encased was because it had to be repaired more frequently.

* * * *

[Tr. 229, R. 162]

Q. Did anybody to your knowledge alert the railroad that is prior to John Rogers' incident on June 28, 1993, did anybody at U. S. Silica alert the railroad that that pipe had burst on Saturday?

A. Not to my knowledge.

* * * *

[Testimony of Gilberto Lopez, Tr. 239, R. 172]

Q. Was it cased in 1993?

A. No.

Q. And on Saturday before Mr. Rogers got hurt on Monday did a leak occur in the eight and nine four inch slurry pipe under the flour track?

A. On the weekend.

Q. Yes, on Saturday?

A. Yes.

Q. Between the rails below the track.

A. I couldn't tell if it was between the rails.

Q. But it was underneath that track?

[Tr. 240, R. 173] A. Yes.

Q. Okay and was it patched that day?

A. On the weekend, yes.

Q. But it was not replaced until after Mr. Rogers was hurt, is that correct?

A. The line, yes.

Q. Okay and when, in fact, it was replaced, –

Mr. Boston: Your Honor, I am going to object to his leading the witness. He needs to ask him questions.

The Court: All right, overruled.

Q. When it was replaced, how much of the pipe was replaced?

A. According to the time cards?

Q. Yes.

A. One hundred and forty feet.

* * * *

[Tr. 245, R. 178]

Q. Okay. And there was a leak in the slurry pipe and that is what had caused the problem, correct?

A. That's what they told me, yes.

Q. Did you report that to the railroad?

A. No, because it had already taken care of on the weekend.

* * * *

[Tr. 249, R. 182]

Q. Mr. Lopez, you never did notify the railroad of any of these holes or problems with this pipe, did you?

A. No.

* * * *

[Testimony of William Brown, Tr. 281, R. 214]

Q. And this pipe, this four inch polyurethane pipe, it had broken before and caused holes in it?

A. Yes, sir.

Q. And this happens on a fairly – and I don't mean every day, but I mean on a fairly regular basis, it's something you know is going to happen?

Mr. Trucker [sic]: Line 5

A. Well, are you just specifically talking about the 8 and 9 line or …

Q. Yes, the polyurethane pipe.

A. No, sir, it's a pretty durable pipe. And this pipe that we're talking about now has probably been in there since a year and a half. I don't think we've replaced it since then.

Q. Would you say that it fractures then maybe every year and a half to two years?

A. Yes.

Q. Okay, do you know ehn [sic when] that pipe – not this piece, obviously, since it must have been repaired or replaced before, but do you know when that line was put under there, under the track, originally?

A. No, sir.

* * * *

[Tr. 283, R. 216]

Q. Do you have any account for why they had to replace 140 feet of the 8 and 9 discharge pipe?

[Tr. 284, R. 217] Mr. Tucker: Line 16.

A. I would say that's the – 140 feet is – from the discharge hose off the 8 and 9 pump. The rubber hose stops right at the pump side of the track. The 140 feet was probably replaced from there over to wherever it comes out of the ground at which is over there by the little building over there.

* * * *

[Testimony of Alan J. Groleau, Tr. 338, R. 271]

Q. Okay. You didn't know that there was any high pressure water or slurry pipe running under the track, did you?

A. No, sir.

[Tr. 339, R. 272] Q. Nobody from U. S. Silica told you anything about that?

A. No. sir.

* * * *

[Testimony of Edward G. Cody, Tr. 618, R. 548]

Q. Are you familiar with the pipeline requirements for putting pipe underneath the track at a plant such as a U. S. Silica plant at Edmonds, South Carolina, the area guidelines?

A. Yes, sir.

Q. And are those the same guidelines as the Norfolk Southern Guidelines?

A. Yes, sir.

Q. And what are those requirements as far as being cased?

A. Pipelines have to be encased under railroad tracks.

Q. All right, and there is an exception, however, if the division engineer or chief engineer of the railroad grants it, is that correct?

A. Yes, sir.

Q. Has one ever been granted as to the pipe under U. S. Silica?

A. Not that I'm aware of.

Q. Also does not the industry have to notify you of each time they repair or replace a track so that you can observe it and be sure that there is no endangerment to the track?

[Tr. 619, R. 549]A. Yes.

Q. Has that ever been done?

A. Not that I'm aware of, no.

* * * *

[Tr. 624, R. 554]

Q. Prior to this accident or this date of this incident on June 28, 1993, you did not know there were slurry pipes running under that track, did you?

A. No, sir.

Q. How long have you been the Division Engineer?

A. For this territory?

Q. Yes, sir.

A. Since February of 1989.

* * * *

[Tr. 625, R. 555]

Q. Okay, when an industry like U. S. Silica wants to put a pipe under the track, isn't there an application they are supposed to fill out?

A. Yes, sir.

Q. I'll show you on plaintiff's exhibit number 14 is that a – is that the application?

A. Yes.

Q. Now did you look through the records at the railroad to see if there had been an application filed by U. S. Silica for putting pipes under this track?

A. I had no records in our office.

Q. My first question is did you look?

A. Yes, sir, and the office in Greenville, the headquarters there, we looked.

Q. And what did you see?

A. We had no record.

[Tr. 626, R. 556]Q. All right, these guidelines that we are talking about has the railroad been giving them out for some time?

A. Yes, sir.

Q. Okay, do you know when this plant were constructed, when these pipes were built?

A. No, sir, I don't.

Q. What is the policy of the railroad, that is, when does it give an industry in its usual procedure when, if at all, does it give an industry that is going to go into a relationship with the railroad in hauling and shipping, when would it give them a copy of this information?

A. When the tracks are built.

Q. So if these tracks were built back in 1961, that would have been done in 1961?

A. Yes, sir.

* * * *

[Tr. 713, R. 643]

Q. But, in fact, you have no information to indicate that anyone with Norfolk Southern ever notified U. S. Silica of those requirements, do you?

A. No, I just had to assume they did.

Q. Just assume it. You don't know.

A. No.

Q. You assume it because the train is operating on the track?

A. No, the policy that when a track is built the plan have to be approved by the Design Department and at that time also that the information, everything, is given out. That's the way its been done since I have known it.

* * * *

[Testimony of John David Rogers, Tr. 739, R. 669]

Q. Okay, do you know of any individual or department of the railroad who did have the responsibility of going out to U. S. Silica and inspecting the pipes that might run under the track?

A. The Bridge and Building Department has the ultimate responsibility of checking or inspecting and checking culverts, water lines, that type stuff.

Q. Are you in the Bridge and Building Department?

A. No, sir, that's a separate department.

Q. Were you ever asked to do that at U. S. Silica?

A. No, sir.

Q. And I think I may have asked you and I'm sorry if I did, did you know before June 28, 1993 of any pipe running under the industry's track there at U. S. Silica?

A. No, sir, I did not.

* * * *

[Tr. 766, R. 696]

Q. Can you tell us what effect, if any, the surgery – the incident in your opinion – well, let's say since June 28th, 1993, what changes, if any, have occurred to your ability to do those kinds of things.

A. Since '93?

Q. Yes, sir.

[Tr. 767, R. 697] A.I don't do much anymore. I have been to the golf course probably a half of dozen times, I mean, a dozen times and tried to play – it doesn't work.

Q. Do you play eighteen holes?

A. I beg your pardon?

Q. Do you play eighteen holes?

A. Oh, no, sir.

Q. How long has it been since you played golf, if you recall, approximately?

A. Probably a couple of months maybe.

* * * *

[Tr. 769, R. 699]

Q. Now earlier you testified you said something just quickly about the Bridge and Building Department of the railroad, which is a different department from your department, correct?

A. Yes, sir, that's correct.

Q. And the Bridge and Building Department handles such things as bridges and buildings and culverts – we are talking about railroad property, correct?

A. That is correct.

Q. Okay, so there we [sic [were]] no bridges, buildings or culverts out at the U.S. Silica plant that the railroad Bridge and Building Department would have anything to do with.

A. I'm not sure I understand your question.

Q. Okay, the Bridge and Building Department of the railroad is concerned with the railroad's building, the maintenance of the railroad buildings, correct?

A. Yes, sir.

Q. And bridges –

A. Yes, sir.

Q. – that the trains go over?

A. Yes.

Q. Like we see all over the state.

[Tr. 770, R. 700]A. Yes, sir.

Q. And culverts, big culverts, that go under the main line of the railroad.

A. Yes, sir, that's correct.

Q. There weren't any of those types of things out here at U. S. Silica, were there?

A. I don't know that, sir.

Q. But the times you went out there to inspect that track once a month or I think you said twelve times or fourteen times, there were Norfolk Southern bridges or buildings or any of those big culverts for the Bridge and Building Department to be involved with that you saw, were there?

A. That I saw, no, sir.

* * * *

[Tr. 777, R. 707]

Q. Now as you approach the building on the tracks or between the tracks, to your right about ten or fifteen feet there is a line, a four inch line, that runs into the ground. Do you recall ever seeing that on any of your inspections?

A. No, sir.

Q. All right, sir. To your left in the vicinity of the wet processing building do you recall seeing a line come out of the ground and go off into the distance to a tremendous sand pile four hundred yards or so off in the distance?

A. No, sir. I was there to look at the railroad. I wasn't there to look at the pipes.

Q. So you never looked around the area to see what was there?

A. No, sir.

Q. Do you – When I say, let's refer to plaintiff's Exhibit 1 again, the main line is down toward the bottom of plaintiff's Exhibit 1 and this is the building the manufacturing plan on your right?

A. The main line is over here.

Q. But I mean it is going out.

A. Yes, that's right.

Q. And this is back toward the end of the industrial track?

A. That's correct.

Q. And this little road right here is a line that's sitting on top of the ground. If it's a line sitting on top of the ground, it's an eight inch line, did you never see that?

[Tr. 778, R. 708] A. Never really paid attention to it, no.

Q. Didn't pay any attention to it? May have seen it, but you just didn't –

A. Well, I had no reason to look at it, sir.

Q. Okay. Did you have occasion to see lines that ran out here in this direction away from the plant?

A. No, sir.

Q. Did you ever have occasion to look to the left in this photograph off in a distance and see a line running up a sand pile to the top of a cyclone and I mean just a tremendous pile of sand out there?

A. No, sir, can't say as I did.

Q. So your attention then was drawn to just inspecting the track itself?

A. It was my job to inspect the track.

Q. Did you ever give any thought to whether or not the plant was serviced – you knew what this plant did?

A. I really didn't, no.

Q. You did not?

A. No, sir, I did not.

Q. You weren't aware then of what U. S. Silica was in the way of a manufacturing plant?

A. I knew it had something to do with sand. I really didn't know what they did.

Q. Right. Did you have any idea that they had a mine across the road?

A. No, sir, I didn't.

[Tr. 779, R. 709] Q. So you didn't know anything about where they got sand and how they brought it in?

A. No, sir, I didn't.

* * * *

[Testimony of George Foster, Tr. 837, R. 762]

Q. At the time you were there as Plant Manager, were you aware of a requirement that the railroad be notified if the company that is if the industry were going to do pipe work under the tracks?

A. Yes.

Q. How did you know of that requirement of the railroad on the company?

A. I was told that by the man that preceded me.

Q. That preceded you in what capacity?

A. As the Plant Manager.

Q. And what was his name?

A. John Mitchner.

Q. Do you know where he works today?

A. No, sir.

Q. Do you know where he went after you succeeded him?

A. He went to the corporate office as the General Manager.

Q. In Berkeley Springs, West Virginia?

A. Berkeley Springs, West Virginia.

Q. All right, do you also know of a requirement that pipes going under industry tracks be encased?

- [Tr. 838, R. 763] A. Yes.

Q. And whose requirement was that?

A. Industry standards.

Q. What is the source of that requirement? Was that a Pennsylvania Glass Sand Company rule or was that a railroad rule or some other rule?

A. It would be a railroad rule.

Q. All right, sir. How did you learn of the railroad having the rule that required pipes going under the tracks to be encased?

A. Knowledge from the plants in Texas.

Q. The plants in Texas –

Mr. Boston: Your honor, I object and ask that the testimony be stricken if it has to do with knowledge he gained from requirements of separate railroads or plants in Texas. It has nothing to do with the plant in South Carolina.

The Court: Well, hasn't there been testimony that these are national standards, Mr. Boston? I overrule your objection.

Q. So let me get this straight. You got that information from working at the company, is that correct?

A. Yes, sir.

Q. Now on the requirement of the encasements of pipes did you ever have any conversations about that requirement with anybody in Berkeley Springs, West Virginia?

A. John Mitchner.

Mr. Boston: Your Honor, I am going to object to any conversation as being purely hearsay.

[Tr. 839, R. 764] The Court: Was Mr. Mitchner an employee of the company, of U.S. Silica, Mr. Boston?

Mr. Boston: Yes, your Honor.

The Court: All right, thank you. I overrule the objection.

Q. So that information you learned from Mr. John Mitchner?

A. Yes, sir.

* * * *

[Testimony of C.A. Smith, Tr. 869, R. 794]

Q. Were you aware – excuse me – did anyone from U. S. Silica inform you on the day that you went out there or any time before that a pipe had burst, a water pipe or slurry pipe had burst, under the track on Saturday the 26th of June?

A. No, sir.

Q. Did anybody tell you when you went out there or before that, in fact, either the same slurry pipe or another slurry pipe had burst on June 28th, the day that Mr. Rogers went out there?

[Tr. 870, R. 795] A. No, they didn't.

Q. Did you know that there were high pressure slurry pipes running underneath that track?

A. No.

* * * *

[Tr. 875, R. 800]

Q. Are you aware of any other incident at U. S. Silica involving any holes underneath their track before or since – excuse me, before?

[Tr. 876, R. 801] A. Before June of '93?

Q. Yes, sir.

A. No, sir.

* * * *

[Tr. 878, R. 803]

Q. And to your knowledge you haven't found a problem with a rupture in a pipe or a hole under the tracks at any time before the incident on June 28, 1993?

A. Not to my knowledge.

* * * *

[Closing argument, Tr. 1031, R. 953]

[The Court:] Madam Forelady, ladies and gentlemen, I would caution you the closing arguments of counsel are not evidence and should not be considered by you as evidence in this case whatsoever. However, the closing arguments of counsel are an important stage in the proceeding and I would ask that you please give them your close attention. Thank you very much.

Mr. Tucker: May it please the Court?

Ladies and gentlemen of the jury, thank you for your patience. As the judge told you, it is now time for us to make our closing arguments. I promise you I will try to be brief.

As counsel for Mr. Rogers, it is our duty to present the facts to you for you to make a decision. You will make this decision based upon the facts about Dave Rogers' future. The judge will instruct you about the law and you will go back and you will return a verdict. What you are about to do is part of the great service that we as citizens are occasionally called upon to render. This nation was founded on the principle that a person is entitled to a jury of his peers in a decision such as this. And why are we here? We are here because in the United States all people are equal before the law and we do not settle our disputes on the street like they do in some places or behind closed doors. We do it before a jury of our peers with a judge and with lawyers and with rules and with civility and it makes our society work better. And what you are here to do makes you a part of that great system that so many of our forefathers and forebearers fought for and [Tr. 1032, R. 954] died for. It's a very solemn duty and we appreciate your doing it. Every time you walk down the street or drive up and down that street and you look up here at this courtroom, I hope that you will feel good about doing what you are doing now because what you are doing makes you even more a citizen of this country than perhaps you were or felt like you were when you walked in here and you will go out of here and feel good about what you have done and we thank you for that.

What I will do is try to tell you what we think is important about this case and before I do that I know that on behalf of my cocounsel, John Hall and Bob McKenzie, and on behalf of Dave and Kathy and their family we want to thank you personally for what you have done and the hard work that you have put into this case because it is hard work. We have been sitting on those same kind of chairs and we understand, believe me, we understand.

The Judge will give you the law and what I tell you about the law I am not trying to take his job away, but we will

comment on it and try to help you focus and see where we are going and we will talk about the facts.

Early in the trial you heard some opening statements and you hadn't heard any of the evidence yet. At that time that opening statement was sort of like a jig-saw puzzle and we tried to tell you what the box looks like, the cover, so you would know sort of where we were headed. Then the pieces of evidence come in from the stand and depositions and photographs, all one at a time, and they form a picture [Tr. 1033, R. 955] puzzle and you were going to have to put them together and now we are going to talk again about we find at the end of this process.

We are here to consider what happened to Dave Rogers on June 28, 1993, and what happened to him and his wife on that date because on that date he had a very tragic event happen. He was at work for Norfolk Southern and he was called upon to do his job and go out to the facility at U. S. Silica and inspect something that he was told was a hole or something, an occurrence. And that's all he knew. And you have seen this probably so many times you wish you would never see it again. But that's it. Dave had been with them for about nineteen and a half years. He had been a good, faithful employee, had done his job, done everything they asked him to do. He had had promotions and he had a career that was going to provide him and his family with a safe and secure future. And on June 28, 1993, it got ripped right out from him. And instead he is left with a life of pain and suffering and the job that he loved so much, if you don't know anything else about Dave Rogers, I think you know he loved what he did. He was content with that. How lucky is a man who can have a job like that that he loved because it's not like Doctor Stewart described as work, for Dave he loved it. He had that taken away from him and he had it taken away from him for no good reason by two different corporations because of what they did and because of what they didn't do and it was so simple.

There are some things about this case that you have heard about claims of it being open and obvious, open and obvious. What is open and obvious about this case is that Dave Rogers was doing what he was [Tr. 1034, R. 956] told to do the best way he could and the way he was trained when he walked out along that track to look down in there to see as he was required to do as Mr. Cody said, as Mr. Dunn said, what's under the hole, what's in the bottom, what caused it and what has to be done to fix it. And, you know, that's Norfolk Southern's job and that's Dave's job for Norfolk Southern, but do you know who benefited from it as much or more than Norfolk Southern? U. S. Silica because they had to have their cars switched out of their plant like Mr. Holmes told you all or they don't operate. And if they don't ship sand, they can't make any money. They can't make a profit. And he was doing was for them too.

So he comes onto their property to look at that hole. When he goes onto that property on behalf of Norfolk Southern, Dave carries with him something that you need to remember, that is, you know, the train goes by when I say that, Dave carries with him the right to a safe place to work and the judge will tell you that Norfolk Southern because it is a railroad that Dave is covered by a special federal law, which applies to railroad employees, and which says that every employee of that railroad is guaranteed is supposed to have, the railroad is required to give him a reasonably safe place to work and reasonably safe and suitable tools and equipment. They are supposed to take care of him and have a safe place to work for him wherever he goes. And that duty, that entitlement to that right is Dave Rogers' and every other railroad employee takes with him is known to the railroad and has been known to them since they put two rails together to form this after the statute got passed and they knew it and they have known it for the whole thirty [Tr. 1035, R. 957] something years that they knew they didn't have a side track agreement with U. S. Silica. So when it goes out there, the

law says that he has a right to expect a safe place to work and they have to give him that and they didn't do it because on that date you have heard the evidence from their own Division Engineer, Mr. Cody, who told you that if U. S. Silica put an uncased pipe under that track, that was an unsafe condition. And, ladies and gentlemen, on that basis right there we submit to you that you should return a verdict against Norfolk Southern and on behalf of Dave Rogers.

The other thing that is open and obvious to you is that Dave Rogers was doing the best he could and that he was a good man. You saw him. You are going to judge the demeanor, the character and the credibility of each witness that appeared before you. And you are going to look at them and decide is that witness telling the truth, is he trying to be honest with me and I think if you think back in your mind about Dave Rogers, then you will know that he was and you'll know that Pete Coleman was and Tony Samuels was and they told you what happened out there and it didn't have to happen. It shouldn't have happened, but it did. And you will also remember, it's very apparent, that Dave when he was going out there and he went to look at that track, he approached it in a way the best way that he knew how, the way Mr. Coleman said he should do it, the way Mr. Dunn said he should do it and there may have been others that said that. We had a lot of people say a lot of things. He went out along that track because that was the safest place to be. And it's not like it's just an open Grand Canyon. It's not that way. It's in sandy [Tr. 1036, R. 958] ground and it's only a little bigger, wider, than the variations of all of the cross ties that are there, like venetian blinds, so you have got to get out there close. Remember this, he was asked the question when you went out there if you had known that there was a water pipe busted under there, he was asked would you have approached it in a different way. Remember that. That was a question. Would you have approached it in a different way. No, sir, that's the only approach. That's the safest approach. And also

remember this at the time that he went out there, U. S. Silica's own plant manager, Mr. Holmes, Mr. Burke the mechanic said that it should have been taped off and I think it was Mr. Burke this morning or perhaps Mr. Hammer, excuse me, Mr. Hammer who said that if they had a hole and if it wasn't taped off, then that was a violation of U. S. Silica's policy, but it was also a safe place to work that Norfolk Southern did not provide him. And when he went out there along the best way he could, you may later hear that the hole didn't change, well, that's not correct, the hole did change because the ground fell out from under. And if somebody tries to argue with you that his foot sank in the sand, do we really think based upon what you heard from Doctor Owings' deposition and Doctor Alexander and Mr. Groleau and Pete Coleman and Dave himself that the ground fell out from under him and when he tried not to fall in the hole and take care of himself, what happened? It tore his back up. It tore his back up. That's what happened.

And also as to Norfolk Southern, in addition to that, you have heard evidence and questions about side track agreements. We didn't have a side track agreement with Norfolk Southern says U. S. Silica [Tr. 1037, R. 959] and we'll get to them in just a minute. We didn't have a side track agreement, therefore, we don't know anything. That is like an ostrich burying his head in the sand. We don't know anything. We don't see anything. It is not a defense to say we don't know when you refuse to learn. Since 1980 at least the Southern Railway, which was the predecessor of Norfolk Southern, had said we want a side track agreement with you and they wouldn't sign it and you'll have the documents, they've not been read to you yet, but you will have them. This is June 30, 1980 and it sent a side track agreement to Norfolk Southern and they've had it for sixteen years and if Norfolk Southern knew that and they certainly did, they should have gone out there and said U. S. Silica this is real easy, just like we have a right to do, until you sign this

agreement, we don't move your cars and how long do you think that they would have done it? Just about one day in order to get the thing signed and they start pulling their freight and they ship again and that's Norfolk Southern's fault.

You are going to hear all about negligence and all of these words. It's fault, carelessness, recklessness with regard to U. S. Silica. It's negligence. That's a long word. It's fault. They did wrong. They did wrong by not requiring the pipe to be cased. They did wrong by not requiring U. S. Silica to do what everybody knows they should do. With regard to people knowing what they should need to do, you have heard some experts that have come in here like Ron Dunn and Doctor Stewart and Doctor Alexander, Doctor Wolfenbarger. These are experts, people who have expertise. They have knowledge of certain areas of engineering [Tr. 1038, R. 960] and economics and medicine. And why do we bring them here? Because we have the duty to bring these here to you to provide you with the information that you need on that scales of justice to tip that scale just one little millimeter over in Dave Rogers' direction, which is our only burden, and those are the people who can give you the information to allow you to go and return a fair verdict. Ron Dunn is an engineer of many years experience and he told you all about all of those guides and standards and everything else and in the general knowledge in engineering that U. S. Silica had their own plant managers are engineers and those engineering standards say that pipe should have been encased because if that pipe would have been encased, the lines with water would have run all the way out there and U. S. Silica could have taken care of it and the track would never have been in danger.

I would like to read to you from Exhibit number 7. If anybody ever said that they didn't know about putting anything under the track, "Southern is agreeable to permitting for the convenience and accommodation of your company," that's Pennsylvania sand glass, "certain limited or restricted

clearances" and then it goes down "consent to the construction and maintenance that use the facility over, across or under." Under, 1980, sixteen years ago. Sixteen years ago.

You will also see evidence from one of the exhibits that you will be given is a letter where U. S. Silica in 1969 wrote a letter saying "We do not have a side track agreement in Columbia and it is not to our advantage to have one." "Not to our advantage to have one." 1969 they were saying we don't want to have this, that way if anything ever [Tr. 1039, R. 961] happened, we could say we don't know. And I'll say this about Mr. Dunn and about Doctor Thompson and Doctor Bill Stewart if these people thought, and these are good lawyers, they are good lawyers, if you have any doubt in your mind they fault hard for their clients, and I hope you think we have too, do you think that if they thought Ron Dunn was wrong or they thought Bill Stewart was wrong, do you think these companies that have claims departments and medical departments and real estate departments, engineering departments and plants all over the United States, do you think that they wouldn't find an engineer to come in and say that he was wrong? They didn't bring one because they knew they were right.

Now I would like to turn to U. S. Silica. What is U. S. Silica's duty to Dave Rogers? It is not to be negligent, it is not to be careless, it is not to create a situation that could hurt Dave. And what did they do? They had a hole out there. And when did that hole get there? What happened? Why did it happen? What you heard was that it started on Saturday. You have got this pipe and this clamp and you see how thick it is (demonstrating) and they all told you that they send their slurry, that's sand, it's just like sandblasting, it goes through that pipe day after day, hour after hour, however long they operate, and it is wearing it away. It is eating it up. And because it is not cased, they can't turn it, so it's going to wear out on the bottom. Can you see how thick it is? That thing

for it to get to the point where it ruptures it's got to eat through that and they would have you believe, I guess they are saying, they didn't think that it would break again. If they didn't think it would break [Tr. 1040, R. 962] again, why did they already have it scheduled for replacement on Tuesday prior to Dave Rogers being hurt? And why did they wait to have it on Tuesday? Because they had to rent a Nypak machine in Atlanta and they couldn't get it there on Sunday. And why didn't they do it on Monday before Dave Rogers got hurt? Because if they did it on Monday, they knew it would take all day, just like Mr. Burke testified it would, and they knew that if they did that, did not have to pay over time, they knew they had to start early in the morning and they didn't want to miss their switch by Pete Coleman's crew because if they did they couldn't run their mill and they took their chance with Dave Rogers' life for a profit. That's exactly what happened. And that was an eggshell and they told you what was going to happen. They knew what was going to happen. And they said let's get away with it for one more day, we will get these cars pulled, get some new ones in, and then we will replace it after the railroad people are gone. And Dave Rogers has suffered for it and we hope you will compensate him for in according to the law. They put a bandaid on it. They put a bandaid on their pipe and they put Dave Rogers in the hospital for two back operations and they have ruined his life and it isn't right. They said they didn't know it was going to break, yet they keep these things on hand because they have so many breaks. They have got a Nypak machine now they told you about because they have to do it so often. That's what they did. And they want to come in now and say oh, we didn't know we didn't have a side track agreement. They've known that since 1969. They said we don't have a side track agreement. We don't know anything. Up in Berkeley Springs, West Virginia, where you will see [Tr. 1041, R. 963] that letter came from in 1969, it says, yes, we don't have a side track agreement and we don't want one because it isn't to our advantage and they didn't get

one and this happened to Dave Rogers, a man that everyone in here has testified that he is honest and was doing the best that he could. And he approached the hole the best way he could to do his job the way he understood it and he got terribly injured, terribly injured. He did the absolute best that he could.

Even if the rules didn't exist that they say they didn't know about and they weren't applicable, they didn't apply to them, general engineering would tell them that. Is it conceivable, is it conceivable that a company with engineers as its plant manager and working miles and miles of pipes like they do and carrying all the amounts of water and tremendous amounts of sand don't know that it would be safer to have a pipe encased? Is that even possible that they could come to this court and say we refuse to know, therefore, we don't owe Dave Rogers. That's not right and I hope that you will find that it's not right.

You heard two witnesses who said they saw the hole on Monday morning in prior testimony come into this courtroom and say, oh, I'm sorry, now that I've had a chance to think about it I don't think it happened on Monday morning. I am going to tell you what it appears happened based upon the evidence. What happened was that on Saturday that eggshell pipe, by the way remember that when they replaced it, they didn't replace this much, they replaced 140 feet, it took a couple of hours they said and they have all of this and all they are trying to do is please, please, let us move it a little bit away from that flour track, so we can [Tr. 1042, R. 964] argue that it didn't happen, but when they later replaced it, they repaced the whole 140 feet and under two tracks in eight hours, maybe it was eight hours, you will remember. And on Monday they replaced that, in fact, they put that band on it to repair it and they couldn't replace it then. Do you know why? Because remember what they said if they couldn't operate that line when they needed to, the whole mill shut down. And Mr. Burke or whoever it was out there the operations people

said, oh, no, we can't replace that pipe this weekend maybe because they have to get the Nypak machine, but for whatever reason, we can't replace that pipe and the main reason is because tomorrow we have got to operate that line for five or six hours and we'll have to shut down and we can't operate, so we don't want to replace that pipe, plus we don't want to call people in on overtime either. So they schedule it out for Tuesday and they leave the hole out there. Why did they leave the hole out there, why, because they don't have to spend the time digging it up on Tuesday. And on Monday morning Mr. Holmes – I mean Mr. Hammer comes out there and Mr. – I can't think of the other one – whatever the gentleman's name and on Monday they go out and they say, oh, my, a hole, got a tape around it, and they want to tell you it is over here. Were there two holes out there so big that one of them required a safety tape? No records about that, of course. A tape around it? That's interesting. Did they tape their own holes that their employees may get near, but as far as Mr. Rogers and Tony Samuels and Pete Coleman, they don't tape that one. Is that right? And that's what happened. And when the production people like Mr. Hammer saw it on Monday they said this will never do. We have to get this [Tr. 1043, R. 965] thing back into service so the train can switch us in a couple of hours. And they covered it back again and they were running fresh water through it, it bowed this pipe out, it exploded, it burst, washed the ground away and when Lopez is called by Pete Coleman, he goes out and even then he refused to admit that, he didn't tell anybody what had happened. You have heard medical testimony about his two back surgeries. Yes, he did have prior back injuries and I won't go into all of that, he did, no question. And you have heard since the time this case started and it has just been one after another that he had restrictions. He did have restrictions. He went back to work with restrictions just like Mr. Cody said and he was working fine within his restrictions. He had to have two surgeries. He was doing fine. And what happened? He's got pain instantly when it happened, his back

popped loud enough for a man standing nearby to hear it. His back popped. Pain shoots down his left leg like Doctor Alexander told you. What this means is this. The pain is now on his left side, not his right side. That's a new injury. Doctor Owings said "The last one that was – the last operation would be the fourth. Do you have a way to state based on history and your knowledge of what would be the precipitating factor? No, I don't. Since he was under treatment all the time, never seemed to get well, I would assume probably that was there initially even though it was not picked up – it was there initially even though it was not picked up on the MRI or maybe it was not as maybe it increased in amount as time went on, but he never really got all right after that injury." You gave him a whole body disability after the '89 surgery? I did. What was that? Fifteen percent. What is his whole body [Tr. 1044, R. 966] disability now at the end of his fourth operation that you've given? The last time I rated him I said at that particular point I thought he had a thirty percent whole body permanent physical impairment. So it doubled basically? At that time that's what I thought. What is the difference as to what Mr. Rogers can, in fact, do in the way of work today in your medical opinion from the work he could have done in '89? I think there is difference he could and should. Yes. I think today he can't whereas in '89 he shouldn't." And you've already heard in 1989 he didn't do that job, he did a lighter. And you heard Doctor Alexander explain to you that there was pain down the left leg that was right there as soon as he got hurt. That's a hole or log out in the snow and you see rabbit tracks leading up to it, but there's no rabbit tracks leading out on the other side, so you know the rabbit is in the hole and when the left leg pain went away, you know they finally found the real cause of his original leg pain which happened when the ground gave way like Doctor Alexander told you. I guess U. S. Silica lawyers and the railroad lawyers would argue that they can't see the rabbit running in circles

running away, but that's what it was. That's exactly what it was.

I am going to go through quickly with you what Dave Rogers' damages are and here they are. He has a life expectancy of 34.96 years work life. If he's able to keep his job $355,000. If he can only have minimum wage, this is today's dollars, $602,000. If no other job eight thirty-two. His loss of fringe benefits is $347,311. Their own witness, Doctor Wolfenbarger, said that his present job is without fringe benefits it was three hundred and ninety-one. Doctor Stewart talked to you about loss of enjoyment [Tr. 1045, R. 967] of life each year of his life $40,000. His medical charges is thirty-one. If you total these up, his total economic losses taken from this chart seven hundred and two, four seventy-two, minimum wage nine hundred and fifty thousand dollars. Without his job one million one hundred seventy-nine thousand five thirteen. Doctor Wolfenbarger figures of his economic loss and add his fringe benefit loss that we have already talked about, that would be seven thirty-nine. His medical is thirty-one thousand. The loss of enjoyment of life thirty-four, thirty-five years times forty thousand dollars three sixty and that does not include any figure for pain and suffering that you know he has had after his accident when he was laying in bed handing over his keys to the company property. This man who you know is a strong man and a good man his employer saw tears coming out of his eyes he was hurting so bad. His life is ruined. The future that he and his wife had with his career at the railroad it was ripped from his hand and he is reduced to this point today. Ladies and gentlemen, these figures you can add them up. It's up to you. We leave that in your hands and suggest to you that this methodology you add these together and these combinations would yield a figure which you can feel good about when you leave this courtroom and give to Dave Rogers.

On Dave's behalf we thank you. We will talk with you again in just a few minutes and we appreciate your attention. Thank you.

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[Closing argument, Tr. 1063, R. 985]

Mr. McKenzie: Madam Forelady, ladies and gentlemen, I will try to brief. I know you have been sitting there for a long time, but I generally tell every jury that I argue to that I probably won't be as brief or as efficient as you want me to be and I apologize for that. One reason is that we have to sit here and look at twelve people we don't know and we have to try to anticipate everything you are thinking about, so we may have been arguing about things that haven't been bothering you about this case and if we have, I apologize on behalf of all the lawyers. We appreciate your attention. We thank you for being here and I am the last speech to be made. My voice is still bad and I may have to stop earlier and you may clap when that happens and I may have done that to Mr. Boston, which cut some more time out of this, but anyway things happened and I am going to try to get through as quickly as I can.

Now let me tell you this or let me ask you this. Have you heard any testimony that Dave Rogers fell in a hole? Did he fall in a hole? No. Have you heard any testimony that Dave Rogers hurt his back lifting something heavy? No. Have you heard that he hurt his back bending over repeatedly or that he hurt his back because he sat down for long periods of time? No. You see, all of these things that they have been talking about that could have happened didn't happen. We are here for another reason. They can say that he had restrictions placed on him or what he had to do after those first two back injuries and his back surgeries and they're just trying to get you to think that that could have happened somewhere down the line, but, you see, it didn't. It's not relevant. It's not what's important in this particular case. He didn't hurt [Tr.

1064, R. 986] his back because he didn't follow his doctor's orders. He hurt his back because U. S. Silica Company and the Norfolk Southern Railway put him in a position, did not protect him, and hurt him out there on that job that day and when they did it, they put him in such a condition that he could not do the job that he wanted to do anymore. They stopped it right there on that day. There was no chance that he was going to hurt himself lifting something heavy. There was no chance that he was going to hurt himself bending or sitting or doing something like that. They didn't give him a chance if he was going to work carefully and that was going to happen, they stopped it because they didn't take care of him, they didn't protect him.

Now, U. S. Silica says there's a hole out there, you know, it's open and obvious, forget that we didn't put it out there, that's not important. I suggest to you, ladies and gentlemen, it is important. It's very important that they put the hole out there because they did it over a period of time and they could have stopped it. They knew on Saturday they had a problem, they didn't fix it, they could have stopped everything right there, they could have plugged that line, put a new line in and that could have been the end of it. No more story here about this case. But that didn't happen. You know, and they say it's open and it's obvious. Well, there's a hole out there that people can see, it's covered over by cross ties and it's covered over by railroad tracks, you know, and you have got to get up close to see it. Nobody knows how deep it is. Nobody knows unless you have some x-ray vision or something that it was washed out and concave instead of washed in when you have something going [Tr. 1065, R. 987] across surface water washing it out. Didn't know that. Dave Rogers didn't know it. You know, it wasn't obvious. You know, and there's still water running in the bottom of it and they want to say it wasn't changing. That water is washing, it's washing it the hole time, you know, and I think it's important people up here in Fairfield County there are a lot of fish ponds around, you

know, and if a fish pond freezes over and you want to step out it, if you step out on it with your foot, you know, you can go through the hole because you have a lot of weight on a small place. But do you remember, ladies and gentlemen, when Tony Samuels testified? Do you remember what he said, the engineer? Do you remember him telling you about the piece of tin, a piece of tin that people from U.S. Silica brought out there and put out there because, you see, when something like that if you want to spread that weight out, you take a piece of plyboard or you take a piece of tin and you put it down on the ground and you get out on it and it spreads that weight out and you don't go through. You see, they're out there with a piece of tin looking at the hole and then they leave and they take the piece of tin with them and they don't put up that yellow and black ribbon that they put around the other hole. They know Dave is coming. They know that they have got the train stopped. They know that he's on his way out there. And they want to come in here and say we didn't do anything, it was open and obvious, he just came up to it and all of a sudden, you know, the ground gave way under him, it's his fault, it's his fault. I submit to you, ladies and gentlemen, that that is not something that you are going to swallow. It was not his fault, none of it, none of it. He made a judgment. He had to get [Tr. 1066, R. 988] out there and he had to do his job. He had to look in the hole. He had to find out what caused it. He had to protect his employer's equipment, but more importantly, he had to protect the other people that worked there. He was protecting Mr. Samuels. He was protecting Mr. Coleman. He was protecting the people and the equipment of Norfolk Southern Railway and he did a good job. Everybody that testified said he did his job well from the top boss right down to Mr. Coleman and Mr. Samuels too, honest, hardworking, makes his reports on time, does good work. Hurts his back, they put him back to work. Hurts his back again, they put him back to work. They want him there. But, you know, it became a different situation when he hurt it to the point he couldn't go back to

work. Then you've got the railroad in here saying, oh, my goodness, you know, ladies and gentlemen, U. S. Silica caused this. You see the railroad's got a problem. They've got a problem because they had put him out in a situation that they could have prevented as well. They could have required that pipe to be encased. They could have required that industry to comply with all of those standards, but they didn't do it. They knew they didn't do it. They are writing letters in 1980 saying we want you to sign this agreement. You will have those letters when you go back in the jury room. They didn't make that industry comply with its own standards and they come in here and say it's the industry's fault totally. Don't bring back a verdict against the railroad because they caused the hole. Mr. McMaster gets up and says – does he admit anything? What happened on that day? Well, you see, if you just look at that day, I guess Mr. McMaster has got an argument because on that day the hole appeared because of [Tr. 1067, R. 989] what U. S. Silica did. But, you see, years and years the railroad didn't do what it was supposed to do and whereas Dave Rogers was protecting their equipment and whereas Dave Rogers was protecting his co-employees, the railroad wasn't looking after Dave Rogers. You see, Dave Rogers was the inspector of the track, but he didn't inspect the pipe. That wasn't his job. The railroad had another department that came out there and was supposed to look to see if the pipes were under the track and if the pipes were cased and if the pipes were proper there, but they didn't do that. Was there any testimony that they had somebody out there?

The Court: All right, just a moment, just a moment. Objection?

Mr. Henry McMaster: We object. Mr. McKenzie has gone outside of the record.

The Court: All right, please just keep your summation confined to the facts in evidence.

Mr. McKenzie: I did. It's my recollection of the testimony and you have to remember what the testimony is, it is my recollection of the testimony that the testimony was that the pipes were inspected by the bridge department, not by the track department. You, ladies and gentlemen will remember, and if I went outside the record, then that would be wrong, but I suggest to you that you will remember that testimony.

Now, you have got the railroad, they are saying blame Silica. We have got Silica saying blame the railroad. We submit to you that in different ways each one of them is just as responsible as the other [Tr. 1068, R. 990] and you really can't tell the difference. The railroad has an obligation to provide this man with a safe place to work, a safe place to work, and the railroad didn't do it. And I know when you sit there and think about it, the active things, the bad things that happened on that day U. S. Silica did and we agree a hundred percent with the railroad on that. But we do not agree with the railroad that they didn't do anything or maybe we do. They didn't do anything and that's what caused Silica to be able to do what they did. Had the railroad done what they were supposed to do, this never would have happened.

Now the railroad comes in and hires a gentleman, Doctor Wolfenbarger, and-they really don't want to pay any money. They have got a zero up there. But judge to hedge their best, they say, you know, ladies and gentlemen, if you really think we did something wrong, if you really think we ought to pay or make us pay, we don't like the figures that the plaintiff has. We have got our own figures. That figure $391,702, that's the railroad's figure. Now when Mr. McMaster tells you what that figure is, he sort of apologizes and he says, you know, that's what our witness that we paid our money to figured up for us, but, ladies and gentlemen, you don't even have to use that, you see, because this man had a hurt back. If he had kept on, you know, he would have lifted something heavy or bent over too many tines or he would have sat down for too long and he'd blown his back out anyway, so just

forget all of that. But, you see, he was working every day. He worked for four years and he did a good job and, really, this is a figure where you all start, the railroad's figure. This is their bottom figure. You know and the thing about it, as Mr. [Tr. 1069, R. 991] Tucker pointed out to you, that figure doesn't include his fringe benefit figure, which Doctor Thompson said was $347,311. Well, if you just add those two things together, you're up with what he lost from the railroad. Now those are their figures. And you sit there and say, my word, what kind of money are you talking about? But, you see, ladies and gentlemen, it doesn't take long to figure this thing out because if somebody could work thirty years and if you didn't make but $10,000 a year and you stopped him from making $10,000 a year, that's $340,000. You've got to reduce it to present value, but you are talking big figures because it's a life time, it's a long time and there is no question that everybody agrees that this man can't do the job that he had with the railroad. He was lucky to have that job. He knew he was lucky. He liked that job. He wanted to keep it. He wanted to go back to it after this last accident because it's a good job and it's something that everybody wants to hold onto when they have one, you know, and it's been taken from him.

Now I'm about through and you are probably saying, well, thank the Lord you can sit down, but let me tell you some things here that I want to point out. Mr. Ott is talking about Doctor Owings and we didn't bring him up here. We went down and took his deposition and asked these questions. That's perfectly an acceptable way to do it. And Doctor Owings, doctors are busy, and they charge money too. The doctor that testified he charged $250 an hour. Somebody has got to pay that. If you go to their office and you do a booklet like this, question and answer form, it doesn't cost you as much money. Doctors sometimes have problems, they can't be here, but anyway we have got a booklet. He wants to say we [Tr. 1070, R. 992] did something wrong because we took

a deposition? Why didn't he subpoena the doctor and bring him up here himself and let him testify. He did the best he could. Did you hear any medical testimony that we didn't put up? No, you didn't, no. Let's talk about that. Mr. Tucker meant to read this to you and I had marked it in this book for him and he couldn't find where I marked it, so let me cover this. You heard our friend from Charlotte get up here and tell you that all the symptoms of this man were in his left leg and that after they had the operation that the symptoms were gone from the left leg. And he said that's why I attribute this second operation to this particular incident because he continued to have left leg pain. Let's hear what Doctor Owings had to say about it. This is the question I asked him. "But from the standpoint of the symptomatology of the symptoms with the left leg pain is there any time from July of '93 through the fourth operation – " and his answer, "that it totally went away?" Question: "Yes, sir." Answer: "No." And my question was this: "After that fourth operation, what happened to the symptom of the pain in his left leg?" And his answer says, "He said it went away, he felt a lot better." You see, he never had any problem in his left leg until this incident. And they did the first operation and it didn't go away. They did the second operation and it did go away. You see, so it's easy, it's easy to conclude, as Doctor Alexander did, that it was caused by this particular incident. And it's really easy to think why Doctor Owings might hedge on this, because as Mr. Tucker read to you, he said, you know, look, I don't know if it was there to begin with and we missed it or where it just got larger, you know. He didn't pick it up. He didn't pick it up initially and [Tr. 1071, R. 993] that put a question in his mind. He doesn't want to say I did something wrong. But he said the symptoms were there, they operated the first time and they were still there. They operated the second time on that other level and it went away. You know, this man has had two operations on his back as a result of this thing. And of those medical figures we don't have in this the $31,000, almost $32,000, of medical expenses

that you have got there, look at those bills and you will see that of that figure we didn't even have a bill for the operation that took place in July of 1993. That's not even claimed in there because we didn't have it put in evidence. That's our fault. But, you see, the medical expenses are greater than we are claiming.

Mr. Ott: Your Honor, I have to object. He is arguing about things he didn't put in evidence for the jury to consider in their deliberations.

The Court: All right, I am going to sustain that objection.

Mr. McKenzie: And the other thing is this: you know, somebody gets hurt, you hear about somebody a friend or a family member or something in an accident, you don't call them up, you heard they're in the hospital and you say, heard Dave got hurt, you know, I bet he's going to miss a bunch of time from work, boy, I bet he's going to have to have somebody up there looking after him and those kind of things, you know. You don't ask about that when somebody gets hurt, hear about them in the hospital. What did he ask? I hear Dave's been hurt. Is he comfortable? Did they give him something to take his pain away? You see, that is the real, one of the real, elements of damage that nobody has [Tr. 1072, R. 994] talked about. The hurt, the hurt physically, and he has had plenty of that, but the other thing is the hurt emotionally. The man was out there supporting his family, had a good job and everything, being able to sit his daughter in his lap, things of that nature, that's gone. That's the sad part. Those are the things that really hurt and that hurt doesn't go away. That hurt stays with you. So, you see, you have got all of those things to think about. But the only thing you have got to worry about really and I tell this to almost every jury that I argue to, you don't have to please me, you don't have to please Mr. McMaster, you don't have to please Mr. Boston, Mr. Ott, Mr. Tucker, or Mr. Hall. You don't have to please the Judge. The only person you have got to worry about pleasing in this jury verdict is the person that you

look at in the mirror in the morning and if you can please that person and if you can get eleven more people to agree with you, then you have done your job as a juror. This is something that you ought to look forward to. I'm sure that once you get through with this one, you'll say maybe no more, but, you know, jury service is really a civic duty that should mean something to you. When you get through with this case, it ought to make you feel good. It ought to make you feel great. You ought to want to come out of the jury room and shout your verdict out because you have done what you think is right in this particular case. And, ladies and gentlemen, what they want you to do talking about assigning some fault to Dave Rogers is to try to get once you go in and decide what his damages are, they are going to apply a reduction figure if you were to find he was at fault and they will reduce his verdict by that percentage, you see? They are trying [Tr. 1073, R. 995] they say he's not hurt, but if he is hurt, you know, he caused it and you ought to reduce it or we're not at fault or the railroad's at fault, U. S. Silica's at fault. They are trying every way they can to detract from Dave and the fact that he's the one that's hurt. You see and to make the math easy, if you find that Dave was not negligent, that he approached that hole the same way that he would have approached it whether it was there because of a washout or because a pipe bursts and that is because when you walk down the track you have got structure under your feet and you got close to it and if you inch up to it and get as close so that you can stop what's going on and make it safe for your people, he did what any other person would have done under the circumstances. Any reasonable person would have done the same thing.

Now if he had known that they were out there with a piece of tin or that it was blown out by a pipe that was concave and that it might fall out under him, you know, he could see one side, but he couldn't see the one that was concave, it might have made a difference, but, you see, you have got to go by

what he knew. So do what's right, do what you think is right in this case that you can agree on. And, ladies and gentlemen, we say, as I said in my opening statement, you are going to have to protect Dave Rogers because his employer didn't, U. S. Silica sure didn't and there is nobody else left to do it. Do what's right. Bring back a verdict that makes Dave Rogers whole and that's all we are asking. We don't want you to give him anything he is not entitled to, but make sure that you give him everything in which he is entitled because there is no tomorrow, it's today. This is it. This is his only day in court. You can't [Tr. 1074, R. 996] come back and say I wish I had done something else. It's too late. Do what's right. Thank you very much.

The Court: Madam Forelady, ladies and gentlemen, you have been sitting for over an hour and a half. I am going to allow you to retire to your jury room. Do not discuss the case. When you return, I am going to charge and instruct you on the law. You will be here a little while. Try to refresh yourselves and make yourselves comfortable. After we have completed that, you will retire and then you can discuss your verdict. Thank you. Please retire.

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